

STATE OF MICHIGAN
COURT OF APPEALS

VILLAGE OF LEXINGTON,

Plaintiff-Appellee,

v

HARBOR DEVELOPMENT, GERALD
BARTOW, and JOSEPH A. SIMONS, JR.,

Defendants-Appellants.

UNPUBLISHED

June 3, 2008

No. 273770

Sanilac Circuit Court

LC No. 05-030191-CC

Before: Saad, C.J., and Borrello and Gleicher, JJ.

PER CURIAM.

Defendants Harbor Development, Gerald Bartow, and Joseph A. Simons, Jr., appeal as of right from an order awarding them \$67,627.42 in costs and attorney fees under the Uniform Condemnation Procedures Act (UCPA), MCL 213.51 *et seq.* Defendants had requested total attorney fees and costs in the amount of \$119,113.52.¹ We affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

I. Facts and Procedural History

On January 11, 2005, plaintiff Village of Lexington filed a condemnation action under the UCPA seeking to obtain lands owned by defendants to expand a public cemetery. On February 23, 2005, defendants moved for summary disposition, arguing, in part, that plaintiff did not have the authority to appropriate money to acquire the property through condemnation, that plaintiff's appraisal was legally deficient and failed to include a number of elements of just compensation, and that plaintiff had failed to deposit the amount estimated to be just compensation as required by MCL 213.55(5). The trial court denied defendants' motion at this time, but ultimately granted an amended motion for summary disposition filed by defendants on February 1, 2006, on the ground that plaintiff's failure to deposit just compensation as required by MCL 213.55(5) warranted dismissal without prejudice, of plaintiff's action based on lack of subject matter jurisdiction. The dismissal of the underlying action was not appealed.

¹ Of this amount, \$92,910.50 was for attorney fees.

On February 9, 2006, defendants filed a motion to recover \$102,967.80² in costs and attorney fees under § 16(2) of the UCPA. According to defendants, they were entitled to reimbursement for *all* attorney fees they incurred, including those incurred pursuing reimbursement after dismissal of the action, because such amounts were reasonable based on the factors listed in MRPC 1.5(a).³ Defendants also sought to recover expert witness fees for Phillips Engineering and BBP Partners⁴ and to recover, among other costs, the costs of certain depositions. Plaintiff filed a brief opposing defendants' motion, arguing that the amounts sought by defendants were excessive and that defendants were not entitled to reimbursement for expert witness costs. The trial court held a hearing on the matter and issued a written opinion on September 13, 2006. In its opinion, the trial court listed the MRPC 1.5(a) factors and observed that it had considered those factors in making its determination. The trial court noted that defendants had submitted evidence to support their claim that an hourly rate of \$275 per hour was reasonable, including expert testimony and the parties' post-hearing stipulation. On the other hand, plaintiff's expert testified that the hourly rate in Sanilac County ranged from \$145 to \$175 per hour, and averaged \$150 per hour. The trial court concluded "that an hourly rate of between \$145.00 and \$175.00 per hour is a reasonable hourly rate for this type of civil litigation in Sanilac County." However, the trial court further noted that because plaintiff's attorney charged \$180 an hour, it would not be just to limit defendants to a lower hourly rate. Thus, in the interest of fairness, the trial court ruled that "the reasonable hourly rate for reimbursement to Defendants shall be set at \$180.00 per hour." In its September 26, 2006, order granting, in part,

² This amount reflects the costs and fees sought by defendants through January 30, 2006.

³ MRPC 1.5(a) list the following factors to be considered in determining the reasonableness of attorney fees:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

⁴ The parties stipulated that \$10,000 in expert witness fees for another expert, Andrew
(continued...)

and denying, in part, defendants' motion, the trial court awarded defendants \$56,682 in attorney fees.

Although the trial court awarded defendants substantial attorney fees, it declined to award costs and attorney fees to defendants that defendants incurred in seeking reimbursement. According to the trial court, any such fees were not incurred in "defending against the improper acquisition" as required by § 16(2) and, therefore, were not recoverable under the UCPA. The trial court also refused to order reimbursement of the fees charged by defendants' experts, Phillips Engineering and BBP Partners, and refused to reimburse plaintiff for certain deposition fees.

The trial court granted defendants' motion, in part, and denied it, in part, awarding defendants \$56,682 in attorney fees, \$10,000 in reimbursement for expert appraiser fees, and \$945.42 in expenses, for a total award of \$67,627.42. It is from this order that defendants appeal as of right.

II. Analysis

Defendants first argue that the trial court used an incorrect legal framework in considering and ruling on defendants' request for attorney fees under the UCPA. According to defendants, the trial court determined what it believed to be a reasonable attorney fee without first determining the reasonableness of the attorney fees actually charged to defendants as required by our Supreme Court's decision in *Dep't of Transportation v Randolph*, 461 Mich 757, 764-766; 610 NW2d 893 (2000).

An award of attorney fees and costs under the UCPA will be upheld unless the trial court abused its discretion in determining the reasonableness of the fees. *Detroit v Detroit Plaza Ltd Partnership*, 273 Mich App 260, 292; 730 NW2d 523 (2006). An abuse of discretion occurs when the trial court's decision falls outside the range of "reasonable and principled outcome[s]." *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), quoting *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). However, any questions of law that affect the determination are reviewed de novo. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 438; 695 NW2d 84 (2005).

The party requesting attorney fees bears the burden of proving that the fees were incurred and that they are reasonable. *Reed v Reed*, 265 Mich App 131, 165-166; 693 NW2d 825 (2005); MCR 3.206(C)(2). When requested attorney fees are contested, the trial court must conduct a hearing to determine what services were actually rendered and the reasonableness of those services. *Id.* at 166. The trial court may not award attorney fees solely on the basis of what it perceives to be fair or on equitable principles. *Id.*

After the trial court dismissed plaintiff's condemnation action, defendants sought reimbursement of their attorney fees and costs under § 16(2) of the UCPA. Section 16(2) of the UCPA provides, in relevant part:

(...continued)

Chamberlain, were reimbursable.

(2) If the property owner, by motion to review necessity or otherwise, successfully challenges the agency's right to acquire the property, or the legal sufficiency of the proceedings, and the court finds the proposed acquisition improper, the court shall order the agency to reimburse the owner for actual reasonable attorney fees and other expenses incurred in defending against the improper acquisition. [MCL 213.66.]⁵

In the present case, defendants successfully challenged the legal sufficiency of the condemnation proceeding. Furthermore, plaintiff's proposed acquisition was improper due to plaintiff's failure to deposit funds equal to its good faith offer. Thus, defendants were entitled to recover "actual reasonable attorney fees" under § 16(2).

Based on our Supreme Court's holding in *Randolph*, we hold that the trial court did not use the correct legal framework in considering defendants' request for reimbursement for attorney fees. In *Randolph*, our Supreme Court considered the award of attorney fees under § 16(3) of the UCPA. Section 16(3) provides:

If the amount finally determined to be just compensation for the property acquired exceeds the amount of the good faith written offer under section 5, the court *shall* order reimbursement *in whole or in part* to the owner by the agency of *the owner's reasonable attorney's fees*, but not in excess of 1/3 of the amount by which the ultimate award exceeds the agency's written offer as defined by section 5. The *reasonableness of the owner's attorney fees* shall be determined by the court. . . . [MCL 213.66(3) (emphasis added; footnote omitted).]

In *Randolph*, the Supreme Court specifically articulated the manner in which the trial court must determine reimbursement of costs and attorney fees under § 16(3) and held that under the plain language of § 16(3), the trial court must first assess the reasonableness of the fees actually charged. *Id.* at 765, 768. According to the Court:

Subsection 16(3) mandates reimbursement "in whole or in part" of the "owner's reasonable attorney fees." The statute gives the trial court discretion to determine "[t]he reasonableness of the owner's attorney fees." Giving effect to all of subsection 16(3), there are *two* discretionary decisions that the trial court must make in ordering reimbursement of attorney fees under subsection 16(3).

Initially, the court must determine whether the "owner's" attorney fees are "reasonable." In this respect, subsection 16(3) differs from other fee-shifting statutes that simply authorize the trial court to award "reasonable attorney fees" without regard to the fees actually charged. For example, under the Michigan Civil Rights Act, MCL 37.2802; MSA 3.548(802), the trial court is not required to make a finding regarding the reasonableness of the attorney fees being charged

⁵ Section 16 was amended by 1996 PA 474, effective December 26, 2006, after this case was decided. However, § 16(2) was not changed by this amendment.

to the plaintiff; instead, the court is free to award *any* fee as long as it is reasonable. However, under subsection 16(3), the focus of the reasonableness determination clearly is on the *owner's* attorney fees. Indeed, subsection 16(3) specifically requires "reimbursement" of those fees. [*Id.*, 765-766 (footnote omitted.)]

The Court further stated in *Randolph* that the trial court should consider the eight factors listed in MRPC 1.5(a) in making its reasonableness determination and that "[i]f the trial court determines that the owner's attorney fees are *unreasonable*, it should utilize its discretion to determine what amount of the owner's requested attorney fees should be reimbursed" *Id.* at 766 (emphasis in original).

In *Randolph*, the Supreme Court remanded the attorney fee award for reconsideration because

the [trial] court did not properly begin its analysis by considering whether the attorney fee actually charged to defendants was reasonable under MRPC 1.5(a). Instead, it is apparent that the court was focused on determining what it believed to be an appropriate fee award under the circumstances without respect to the attorney fee actually charged to defendants. [*Id.* at 768.]

In so holding, the Supreme Court explained that "a trial court has discretion to make such an independent determination, but only *after* the court has determined . . . that the owner's attorney fees are unreasonable" *Id.* (emphasis added). Therefore, the Court remanded the case for reconsideration, recognizing that the trial court was free to reach the same decision on remand as it reached in the first instance, under a proper analysis.⁶ *Id.* at 769.

Although *Randolph* addressed the propriety of a cost and attorney fee award under section 16(3) of the UPCA, and defendants in this case sought to recover costs and attorney fees under section 16(2) of the UPCA, we find the reasoning and holding in *Randolph* to be applicable to this case because the costs and attorney provisions are both contained in the UPCA, and the language in both § 16(2) and 16(3) are similar. Section 16(2) provides that "the court *shall* order the agency to reimburse *the owner for actual reasonable attorney fees*["] (Emphasis added.) This provision is similar to § 16(3), which provides that "the court *shall* order reimbursement . . . *of the owner's reasonable attorney's fees*["] (Emphasis added.) Indeed, the language used in § 16(2) even more explicitly requires the trial court to focus on the reasonableness of the attorney fee *actually charged* to the owner than does § 16(3). Thus, we conclude that the Supreme Court's holding in *Randolph* governs the disposition of this case.

⁶ In *Randolph*, the Supreme Court recognized "that, under the plain language of subsection 16(3), trial courts can and will reach different decisions concerning reimbursement of attorney fees. However, that is the nature of discretionary decisions. The key in each case is that the trial court provide a reasoned basis for its decision." *Id.* at 767-768.

We find that the trial court's determination of the reasonableness of defendants' attorney fees in this case suffers from a defect similar to the trial court's deficient analysis in *Randolph*: in both cases, the trial court improperly "focused on determining what it believed to be an appropriate fee award under the circumstances without respect to the attorney fee actually charged to defendants." *Randolph, supra* at 768. In light of *Randolph*, we find that the trial court in this case should have first determined the reasonableness of the attorney fees actually charged to defendants, in light of the factors listed in MRPC 1.5(a). *Id.* at 766. Although the trial court noted in its opinion that it had considered the MRPC 1.5(a) factors, the trial court failed to make a determination regarding whether the fee actually charged to defendants was reasonable under MRPC 1.5(a), instead independently determining what it believed to be reasonable attorney fee. The trial court concluded that "an hourly rate of between \$145.00 and \$175.00 per hour is a reasonable hourly rate for this type of civil litigation in Sanilac County" and that a reasonable hourly rate for reimbursement to defendants should be \$180 per hour because counsel for plaintiff charged \$180 per hour and, according to the trial court, it was not "fair" to reimburse defense counsel at an hourly rate less than that charged by plaintiff's counsel.

The trial court may not award attorney fees solely on the basis of what it perceives to be fair. *Reed, supra* at 166. Furthermore, the trial court's analysis runs afoul of the Supreme Court's determination that in considering a request for reimbursement of attorney fees, the trial court "[i]nitially . . . must determine whether the 'owner's' attorney fees are 'reasonable.'" *Randolph, supra* at 765. According to *Randolph*, a trial court should not make an independent assessment of what a reasonable attorney fee would be unless it first finds that the fee actually charged to the owner was unreasonable. *Id.* at 766. In this case, the trial court did not make any finding regarding the reasonableness of the fees actually charged by counsel for defendants. Because the Supreme Court's reasoning in *Randolph* is equally applicable to a determination regarding the propriety of an award of costs and attorney fees under § 16(2), we remand for reconsideration of defendants' request for attorney fees under § 16(2). On remand, the trial court must first analyze the reasonableness of the attorney fees actually charged to defendants in light of the factors listed in MRPC 1.5(a). Then, only if the trial court determines that the fees are unreasonable, it may use its discretion to make an independent determination of reasonableness. We observe, as did the Supreme Court in *Randolph, Randolph, supra* at 769 n 16, that nothing in our decision should be interpreted as precluding the trial court from reaching the same decision on remand, as long as it follows the proper legal framework in making its decision.

Defendants next argue the trial court erred by declining to award them costs and attorney fees that they incurred in seeking reimbursement of costs and attorney fees under the UCPA.

Section 16(2) of the UCPA provides that "the court shall order the agency to reimburse the owner for actual reasonable attorney fees and other expenses *incurred in defending against the improper acquisition.*" (Emphasis added.) Thus, for defendants to prevail on this issue, we must find that the attorney fees and other costs incurred while seeking reimbursement of attorney fees and other expenses under the UCPA were "incurred in defending against the improper acquisition." MCL 213.66(2).

Both this Court and our Supreme Court have recognized that the legislative intent behind the UCPA "is to 'place the owner of the property in as good a position as was occupied before the taking.'" *Escanaba & Lake Superior Railroad Co v Keweenaw Land Ass'n, Ltd*, 156 Mich App 804, 815, 402 NW2d 505 (1986), quoting *Detroit v Michael's Prescriptions*, 143 Mich App

808, 811; 373 NW2d 219 (1985). See also *Randolph*, *supra* at 764. In *Randolph*, the Supreme Court further discussed the purposes of the UCPA:

“[T]his Court has identified three purposes of the attorney fee provision of the UCPA. First, awarding attorney fees will assure that the property owner receives the full amount of the award, placing the owner in as good a position as that occupied before the taking. *Dep’t of Transportation v Robinson*, 193 Mich. App. 638, 645; 484 NW2d 777 (1992). Second, the fee structure penalizes agents of a condemnor for deliberately low offers because a low offer may result in the condemnor paying the owner’s litigation expenses as well as its own. *Flint v Patel*, 198 Mich App 153, 157; 497 NW2d 542 (1993); *Robinson*, *supra*, p 645. Third, the fee provision provides a performance incentive to the owner’s attorney, because the fee awarded is directly proportional to the results achieved by counsel.” [*Randolph*, *supra* at 764-765, quoting *In re Condemnation of Private Property for Hwy Purposes (Dep’t of Transportation v Curis)*, 221 Mich App 136, 142-143; 561 NW2d 459 (1997).]

Defendants argue that this Court’s holding in *Escanaba* supports their argument that costs and attorney fees should have been awarded in this case for the proceedings in which defendants sought reimbursement of costs and attorney fees under the UCPA. In *Escanaba*, the plaintiffs filed a condemnation action under the UCPA, and the defendants prevailed on their motion for summary disposition. *Escanaba*, *supra* at 808-809. The plaintiff moved for rehearing and, when defendants filed a brief in opposition, also moved to disqualify the trial judge. *Id.* at 809. This Court held that attorney fees incurred by defendants in defendant against the plaintiff’s motion to disqualify the trial judge were reimbursable. *Id.* at 821. We also held that attorney fees incurred by defendants on appeal were reimbursable. *Id.* at 822. In so holding, we stated:

Clearly, the issues in dispute in this appeal grew out of the property owners’ “defending against the improper acquisition.” But for the defense, there would be no appeal. Therefore, while the expenses on appeal were not *directly* incurred in defending against the acquisition, they are certainly expenses incurred in *continuing* to defend (viz.: preserve benefits won) against the improper acquisition. [*Id.* at 819.]

To support their contention that the trial court should have awarded them costs and attorney fees incurred in their efforts to recover costs and attorney fees under the UCPA, defendants also cite this Court’s unpublished opinion in *Detroit/Wayne County Stadium Authority v Aubrey*, unpublished opinion per curiam of the Court of Appeals, decided September 28, 1999 (Docket No. 208679). In that case, we held that attorney fees incurred while litigating an attorney fee dispute were “incurred in defending against the improper acquisition” under MCL 213.66(2) and were therefore recoverable if they meet the requirement of reasonableness. We further held:

[T]his Court has not construed the phrase “incurred in defending against the improper acquisition” in MCL 213.66(2); MSA 8.265(16)(2) as being limited to expenses directly incurred. *Escanaba & Lake Superior R Co v Keweenaw Land Ass’n, Ltd*, 156 Mich App 804, 819; 402 NW2d 505 (1986). It is sufficient that

the attorney fees were incurred in continuing to defend a judgment (e.g., preserving benefits won). *Id.* at 819. Hence, an award for attorney fees incurred on appeal from an order awarding attorney fees and expenses has been upheld under MCL 213.66(2); MSA 8.265(2). *Id.* at 819. Accordingly, we hold that attorney fees incurred while litigating an attorney fee dispute are reimbursable if they meet the requirement of reasonableness. To hold otherwise would contravene the legislative intent that a property owner shall not be made to suffer from the condemnation proceedings on the taking of private property. *Id.* at 814-815. [*Id.*, slip op at 2.]

We are mindful that our unpublished opinion in *Detroit/Wayne Co Stadium Authority* is not precedentially binding under the rule of stare decisis and that we are not bound to follow it. MCR 7.215(C)(1). However, we are persuaded by its reasoning and analysis and we therefore adopt the portion of the opinion quoted above as our own. Therefore, we hold that attorney fees and other expenses incurred while litigating an attorney fees and cost dispute under the UCPA are recoverable because they are incurred in “defending against the improper acquisition.” MCL 213.66(2).

We note that our ruling does not provide for an automatic award of attorney fees and other expenses when litigating issues involving whether attorney fees and other expenses are reimbursable. Rather, the trial court, pursuant to § 16(2), must first make a determination that such attorney fees and other expenses are reasonable. If the trial court does determine that attorney fees are reasonable, then it must apply the same analysis dictated by our Supreme Court in *Randolph*, *supra*, to determine the proper amount of such fees. We therefore vacate the portion of the trial court’s order denying defendant’s reimbursement of their reasonable attorney fees and other expenses incurred as a result of litigating the issue of reimbursement and remand this issue to the trial court to make a determination as to the reasonableness of such attorney fees and other expenses.

Defendants next argue that the trial court erred in denying their request for reimbursement for deposition costs on the ground that they were not used at trial.⁷

Section 2549 of the Revised Judicature Act (RJA), MCL 600.2549, provides:

[R]easonable and actual fees paid for depositions of witnesses filed in any clerk’s office and for the certified copies of documents or papers recorded or filed in any public office shall be allowed in the taxation of costs only if, at the trial or when damages were assessed, the depositions were read in evidence, except for impeachment purposes, or the documents or papers were necessarily used.

⁷ We note that defendants rely on § 16(5) in support of their argument that they are entitled to be reimbursed for deposition fees. In their motion below, defendants sought reimbursement of deposition transcript costs. However, § 16(5) addresses liability for expert witness fees and is irrelevant to defendants’ claim for deposition fees.

Thus, deposition costs are taxable under the RJA only if the depositions are read into evidence or necessarily used. *Portelli v I R Constr Prods Co, Inc*, 218 Mich App 591, 605; 554 NW2d 591 (1996). However, § 16(2) of the UCPA provides that “the court shall order the agency to reimburse the owner for actual reasonable attorney fees *and other expenses* incurred in defending against the improper acquisition.” (Emphasis added.) The word “expenses” means “money paid out that otherwise would not have been paid had a condemnation proceedings not been undertaken.” *Escanaba, supra* at 817. The broad “other expenses” language of the UCPA is clear and unambiguous, and plainly includes fees paid for deposition costs because such fees would not have been paid had plaintiff not commenced condemnation proceedings.

To the extent that the RJA and the UCPA are in conflict concerning whether deposition costs are recoverable, the more specific provisions of the UCPA govern this case. *Ross v Modern Mirror & Glass Co*, 268 Mich App 558, 562; 710 NW2d 59 (2005). Therefore, the broad language of the UCPA controls. Under the UCPA, defendants’ deposition costs were an expense under § 16(2) because defendants would not have paid for such depositions if plaintiff had not commenced condemnation proceedings against them. Thus, the trial court erred in denying defendants’ request for reimbursement of deposition costs on the ground that the depositions were not used at trial. Because the deposition costs constituted an expense under § 16(2) of the UCPA, the only question that remains is whether such costs were “incurred in defending against the improper acquisition.” MCL 213.66(2). We therefore remand this issue to the trial court to determine whether the deposition fees claimed by defendants were incurred in defending against plaintiff’s improper acquisition. If they were, defendants are entitled to reimbursement under § 16(2) of the UCPA.

Next, defendants argue that the trial court erred in denying their request for reimbursement of expert fees paid to Phillips Engineering and BBP Partners, who assisted defendants’ appraiser in determining the highest and best use of the property.

The UCPA contains provisions regarding expert witness fees:

(1) *Except as provided in this section*, an ordinary or expert witness in a proceeding under this act *shall receive* from the agency the *reasonable fees and compensation provided by law for similar services in ordinary civil actions in circuit court, including the reasonable expenses for preparation and trial*. (Emphasis added.)

* * *

(5) *Expert witness fees* provided for in this section *shall be allowed with respect to an expert whose services were reasonably necessary to allow the owner to prepare for trial*. For the purpose of this section, for each element of compensation, *each party is limited to 1 expert witness to testify on that element of compensation* unless, upon showing of good cause, the court permits additional experts. The agency’s liability for expert witness fees shall not be diminished or affected by the failure of the owner to call an expert as a witness if the failure is caused by settlement or other disposition of the case or issue with which the expert is concerned. [Emphasis added.]

In denying defendants' request for reimbursement of expert fees under the UCPA, the trial court relied on *Detroit v Luftran Co*, 159 Mich App 62, 67; 406 NW2d 235 (1987), in which this Court, relying on MRE 702, held that time spent educating counsel about expert appraisals, strategy sessions, critical assessment of the opposing party's position, and similar tasks, is not properly compensable as expert witness fees. Since *Luftran* was decided, however, § 16(1) has been amended to add the words, "Except as provided in this section." Arguably, this language eliminates any potential conflict with other provisions, including MRE 702. We find it unnecessary to decide that issue, however, because under the current language of § 16(5), each party is limited to one expert for each element of compensation. Phillips Engineering and BBP Partners worked on the same element of compensation as defendants' appraiser, i.e., the highest and best use of the property, and apparently assisted defendants' appraiser in determining that value. The appraiser was reimbursed by stipulation of the parties. Therefore, defendants were not entitled to be reimbursed for the additional expert services provided by BBP Partners and Phillips Engineering. Therefore, even if the trial court erred in relying on the rationale in *Luftran*, *supra*, it reached the right result in concluding that defendants were not entitled to reimbursement of this expense. We therefore decline to reverse this part of the trial court's decision on appeal. *In re People v Jory*, 443 Mich 403, 425; 505 NW2d 228 (1993).

For their last claim of error, defendants argue that the trial court erroneously found that it did not have discretion to allow defendants to depose plaintiff's expert before the evidentiary hearing on defendants' motion for reimbursement. Although plaintiff opposed defendants' motion to compel below, it now agrees with defendants that, on remand, the trial court has discretion to allow post-judgment discovery. Therefore, we need not consider this issue further.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher